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No. 91-1581

In The

Supreme Court of the United States

October Term, 1991

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Petitioner,

vs.

GERRISH CORPORATION, doing business as Gerrish Motors, doing business as Scrub-a-Dub,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents' Brief in Opposition to the Petition for *Certiorari* begs the very question raised, by simply assuming that Vermont agency and insurance law must be what the Second Circuit said it was. Having made that assumption, Respondent then employs it as a bootstrap to argue that there is in this case no due process issue, but only one of Vermont agency law. Respondent, like the Second Circuit, avoids all reference to the Vermont insurance regulatory statutes which specifically govern the policy in question, and with which the Petitioner fully complied in having its form of insurance policy pre-approved by the Vermont Department of Banking and Insurance ("VDBI"), because the statutes mandate the due process protections urged by the Petitioner.

The Vermont insurance statutes are form-specific rather than filer-specific; that is, the statutes provide for the filing and approval (and withdrawal of approval) of insurance policies on a form-by-form basis. 8 V.S.A. §§ 3541, 3542. The statutes do not, as Respondent would have it, license an insurance company or rating organization as an authorized filer, and then permit generalized notice to that filer to take the place of notice directed to a particular form. As 8 V.S.A. § 3541(b) and (c) dictate, VDBI had always, prior to the district court's opinion in this case, directed its notices of approval, disapproval, or withdrawal of approval to the particular form under consideration. Whether VDBI gave notice to an insurer or to the Insurance Services Office ("ISO"), acting as agent for a number of insurers, notice was directed to the particular form affected.[1]

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[1] VDBI could presumably have chosen to act through generalized rule-making, but elected not to. If VDBI had chosen to

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Contrary to the suggestion made by Respondent that Universal first filed an ISO Authorization Form in October of 1982, the evidence in the case (about which there was no dispute) established that Universal had had an ISO authorization form on file with VDBI for a number of years prior to 1982, and had such an authorization on file at the time the Unicover III policy form was first filed in 1980. Knowing Universal had an ISO authorization on file, VDBI nevertheless had, historically and without exception, treated Universal's Unicover III policy form as a filing separate and distinct from any filings made by ISO. That fact was nowhere made clearer than through the testimony that, during the years 1978-83, when VDBI refused to approve a pollution exclusion for use in ISO's form of general liability policy, it approved the pollution exclusions in the Unicover III policy (because of the nature of the increased risks insured under the latter policy). The Department's conduct in treating the Unicover III policy form as distinct from ISO's general liability policy form is in accordance with the mandate of the last sentence of 8 V.S.A. § 3541(a), which says that authorization of a rating organization shall not preclude an insurer from continuing to act in its own behalf.

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act through adoption of a rule, Universal as a member of the affected public would at least have had an opportunity to challenge the authority of VDBI, under 8 V.S.A. § 3542, to dictate the substantive provisions of a form of liability insurance policy. As it stands, Universal has never had the chance to raise the issue of the agency's subject matter jurisdiction over pollution exclusion clauses.

Both the district court and the Second Circuit, in their zeal to find coverage where admittedly none existed in the policy issued to Gerrish, hold that Universal's authorization of ISO to file ISO forms on Universal's behalf made ISO Universal's agent for every purpose, including amendment of the Unicover III policy, which ISO neither filed nor serviced on Universal's behalf. The courts' order thereby holds that once an agent is authorized to act in some transactions for its principal, all of the principal's other transactions thereafter conducted in its own behalf directly with third parties are subject to alteration by actions which the agent may take in some unrelated transaction, whether or not known to the third party or intended by the principal. It is that far-fetched interpretation of Vermont agency law – supported by no citation to statute or case law – that deprives petitioner of the due process protections which the legislature saw fit to incorporate in the insurance regulatory statutes.[2]

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[2] The lower courts' allusion to agency law is misplaced in the first instance since the "apparent authority" principle relied upon comes into play only where a third party relies to its detriment on the mistaken belief that an agent is authorized to act in the matter on a principal's behalf. Gerrish, the third party here, never knew about the 1984 amendment made to ISO's general liability policy. If VDBI had standing as a third party to raise the issue, it could not claim to have relied on actions of ISO to bind Universal in this instance, since the Department had always dealt directly with the principal, Universal, on every question pertaining to the Unicover III policy form, both before and after ISO filed an amended pollution endorsement to its policy form. In short, VDBI never communicated through or dealt with ISO with respect to the Unicover III form. ISO filed a variety of endorsements and changes to its many policy forms during the years 1978-84, and VDBI never considered or held any of them, including the endorsement at issue, applicable to the Unicover III policy.

Where the statute requires form-specific notice, where the Department had always given form-specific notice in the past, and where Universal had been given by VDBI to understand that its Unicover III policy form was independent of any form filed by ISO, judicial interpretation holding that notice to ISO about an ISO-filed policy form constitutes notice to Universal about its independently-filed form deprives Universal of the straightforward, form-specific due process protections afforded by Vermont's regulatory statutes. The departmental notice given to ISO, which Respondent now argues satisfied VDBI's obligations to Universal, was notice to ISO that VDBI intended to withdraw approval of a January, 1983 ISO insurance program which permitted the pollution coverage to be provided in a separate policy offered in conjunction with the general liability form in use by ISO – a program which apparently had proven unsatisfactory. The Unicover III policy form was not a part of that ISO program, and was not affected by the January, 1983 changes to ISO's policy forms. There is no logical reason why Universal's Unicover III policy would be affected by the change to the ISO insurance program which ISO consented to in October, 1983 (two weeks before VDBI again approved that portion of the Unicover III policy – the Vermont State Amendatory Part – referencing the pollution exclusions contained in the Unicover III form). The Unicover III policy, unlike ISO's, always contained the pollution exclusion which was included in Gerrish's policy, and had been approved for Universal's use that way since 1980 without interruption.

The Vermont legislature undoubtedly could have satisfied the need for statutory due process protections in

this field of regulatory intervention by adopting different notice and hearing provisions, including, for example, notice and hearing provisions directed to filers, not forms. But given the statutory scheme which Vermont did adopt, it should be incumbent on federal courts applying those statutes to afford those regulated thereunder the actual protections enacted by the Vermont legislature.

The Petition for *Certiorari* is not simply a complaint that the lower courts misconstrued Vermont law. The complaint is that, by active redefinition of the terms of an admittedly unambiguous insurance contract, without reference to the statutes which supposedly govern the legally permissible terms of that contract, the federal courts effected deprivation of the minimal due process protections which the Vermont legislature specifically mandated.

Respectfully submitted,

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June 1, 1992